In the Supreme Court of the United States

OCTOBER TERM, 1920

No. 544.

JAMES J. RAFFERTY, AS COLLECTOR OF INTERNAL REVENUE FOR THE PHILIPPINE ISLANDS, PETITIONER,

vs.

SMITH, BELL & COMPANY, LIMITED, RESPONDENT

No. 548.

JAMES J. RAFFERTY, AS COLLECTOR OF INTERNAL REVENUE FOR THE PHILIPPINE ISLANDS, PETITIONER,

vs.

COMPANIA GENERAL DE TABACOS DE FILIPINAS, RESPONDENT

No. 553.

JAMES J. RAFFERTY, AS COLLECTOR OF INTERNAL REVENUE FOR THE PHILIPPINE ISLANDS, PETITIONER,

vs.

VISAYAN REFINING COMPANY, RESPONDENT

BRIEF FOR RESPONDENTS OPPOSING APPLICATIONS FOR WRITS OF CERTIORARI

I
NO ERRORS ASSIGNED OR ARGUED

At the outset, attention is directed to the fact that no error in law in the Court proceedings up to, and including, final judgment in the Supreme Court of the Philippine Islands is alleged in any of these cases. Not only is no error in law alleged or pointed out, but none is even suggested. In fact, it is admitted that no error exists in any of the proceedings connected with these cases up to, and including, final judgment. A writ of certiorari is designed for the purpose of review by the Appellate Court of law errors only. As no errors of law have been assigned and none exist in the Court below, these writs should be immediately denied.

II
THE ALLEGED RATIFICATION IS UNCONSTITUTIONAL

No error in the prior proceedings having been alleged and none being relied upon, petitioner's whole case rests upon the alleged ratification by the Act of Congress of June 5, 1920. The judgment in each of these cases was a final judgment ordered by the Supreme Court of the Philippine Islands. It was for taxes illegally collected between October 1, 1916, and September 30, 1917. That of respondent, Smith, Bell & Company, was rendered on March 15, 1920; that of respondent, Compania General De Tabacos De Filipinas, was rendered on March 16, 1920, by said Court; and that of respondent, Visayan Refining Company, was rendered by said Court on March 18, 1920. These judgments were absolutely final. Petitioner's contention is that each of these judgments was de-

stroyed and nullified by the Act of Congress several months later, or on June 5, 1920. At the outset, respondents deny that Congress ever intended to ratify, or ever did ratify, by said Act or any other Act, the taxes for which judgments herein have been rendered. Respondents contend that the said Act of Congress of June 5, 1920, dealt with an entirely different class of taxes. But assuming that the said Act was intended by Congress to ratify the taxes herein in dispute, respondents further contend that any such ratification to the extent of annulling the judgments herein and destroying them would be, and is, beyond the powers of Congress, unconstitutional and absolutely void.

For convenient reference, we quote said Act of Congress of June 5, 1920:

> "The taxes imposed by the Philippine Legislature in section 1614 of Act No. 2657, enacted by that body February 24, 1916, are legalized and ratified, and the collection of all such taxes made under or by authority of such Act of the Philippine Legislature is legalized, ratified, and confirmed as fully to all intents and purposes as if the same had by prior Act of Congress, been specifically authorized and directed."

From a misunderstanding of the "Insular Cases" and certain subsequent decisions of this Court, it has been asserted that Congress has power unlimited to legislate for the Insular Possessions; that none of the safeguards and limitations of the Constitution of the United States protect lives, liberties and property in the Possessions against Congressional action. This belief has no foundation in the decisions of this Court and none in principle.

If there is no decision of this Court affirmatively applying any guaranty or limitation of the Constitution in the Philippine Islands or Porto Rico, the reason is plain: The occasion has not arisen. No case has been presented in this Court wherein Congress, legislating for the Possessions, has attempted to pass a Bill of Attainder, to grant a Title of Nobility, to prohibit the free exercise of religion, nor, without due process of law, to deprive any person of life, liberty or property.

In cases wherein insular legislatures have encroached upon personal rights, the decisions have been based upon the guaranties of Congressional organic laws, and the Court has avoided as unnecessary determining whether the corresponding provisions of the Constitution would have been applicable. Thus in Kepner *v.* United States, 195 U. S. 100, Justice Day says (p. 124): "It is not necessary to determine in this case whether the jeopardy provision in the Bill of Rights would have become part of the law of the Islands without Congressional legislation."

On the other hand, the power of Congress over the Insular Possessions is derived from the same provision of the Constitution—Art. IV, sec. 3, par. 2—which supported the jurisdiction of Congress in the Territories which later became States. And it has been held, as we shall see, that in legislating for those Territories Congress was not wholly exempt from constitutional limitations.

It has been held that the Uniformity Clause of Art. 1, sec. 8, does not apply to duties imposed by Congress in the Possessions, because the section requires uniformity only "throughout the United States," and the

Possessions are not a part of the United States. Downes *v.* Bidwell, 182 U. S. 224. But in that case even the majority of the Court conceded that the Constitution contains limitations which operate upon the power of Congress wherever exercised; and it is apparent that the decision would have gone the other way if the requirement of uniformity had been stated in the Constitution without the qualifying phrase.

It has been held, also, that the right to trial by jury conferred by the sixth amendment does not extend to the Territories and Possessions. Hawaii *v.* Mankichi, 190 U. S. 197; Dorr *v.* United States, 195 U. S. 138. But in the Mankichi case Justice Brown says for the Court (p. 217): "We would even go farther, and say that most, if not all, the privileges and immunities contained in the Bill of Rights of the Constitution were intended to apply from the moment of annexation; but we place our decision of this case upon the ground that the two rights alleged to be violated in this case (indictment by grand jury and trial by jury) are not fundamental in their nature but concern merely a method of procedure. . . . " And Justices White and McKenna, concurring, point out that Hawaiian laws must yield, "where they were inconsistent with those fundamental provisions of the Constitution which were, by their own force, applicable to the territory with which Congress was dealing."

In the Dorr case, Justice Day says:

> "The exercise of the power expressly granted to govern the territories is not without limitations. Speaking of this power, Mr. Justice Curtis, in the case of Scott *v.* Sanford, 19 How. 614, 15 L. ed. 787, said:

"'If, then, this clause does contain a power to legislate respecting the territory, what are the limits of that power?

"'To this I answer that in common with all the other legislative powers of Congress, it finds limits in the express prohibition on Congress not to do certain things; that in the exercise of the legislative power, Congress cannot pass an *ex post facto* law or bill of attainder; and so in respect to each of the other prohibitions contained in the Constitution'" (p. 142).

* * * * * * *

"The limitations of this power were suggested by Mr. Justice Curtis in the Scott Case, above quoted, and Mr. Justice Bradley in the Church of Jesus Christ of L. D. S. *v.* United States, 136 U. S. 1, 34 L. ed. 481, 10 Sup. St. Rep. 792, said:

"'Doubtless Congress, in legislating for the territories, would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments; but these limitations would exist rather by inference and the general spirit of the Constitution from which Congress derives all its powers, than by any express and direct application of its privisions'" (p. 146).

In Downes *v.* Bidwell, 182 U. S. 262, Justice Brown says, for the majority of the Court:

"To sustain the judgment in the case under consideration, it by no means becomes necessary to show that none of the articles of the Constitution apply to the Island of Porto Rico. There is a clear distinction between such prohibitions as go to the very root of the power of Congress to act at all, irrespective of time or place, and such are operative only 'throughout the United States' or among the several states.

"Thus when the Constitution declares that 'no bill of attainder or *ex post facto* law shall be passed,' and that 'no title of nobility shall be granted by the United States,' it goes to the competency of Congress to pass a bill *of that description.* Perhaps the same remark may apply to the 1st amendment, that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peacefully assemble and to petition the government for a redress of grievances.' We do not wish, however, to be understood as expressing an opinion how far the bill of rights contained in the first eight amendments is of general and how far of local application." (p. 276.)

* * * * * * *

"We suggest, without intending to decide, that there may be a distinction between certain natural rights enforced in the Constitution by prohibitions against interference with them, and what may be termed artificial or remedial rights which are peculiar to our own system of jurisprudence. Of the former class are the rights to one's own religious opinions and to a public expression of them, or, as sometimes said, to worship God according to the dictates of one's own conscience; the right to personal liberty and individual property; to freedom of speech and of the press; to free access to courts of justice, to due process of law, and to an equal protection of the laws; to immunities from unreasonable searches and seizures, as well as cruel and unusual punishments; and to such other immunities as are indispensable to a free government . . . .'" (p. 282.)

In the same case Mr. Justice White, for himself, Mr. Justice Shiras and Mr. Justice McKenna, concurring, says:

> "While, therefore, there is no express or implied limitation on Congress in exercising its power to create local governments for any and all of the territories, by which that body is restrained from the widest latitude of discretion, it does not follow that there may not be inherent, although unexpressed, principles which are the basis of all free government which cannot be with impunity transcended." (p. 290.)
>
> * * * * * * *
>
> "Undoubtedly there are general prohibitions in the Constitution in favor of the liberty and property of the citizen, which are not mere regulations as to the form and manner in which a conceded power may be exercised, but which are an absolute denial of all authority under any circumstances or conditions to do particular acts." (p. 294.)

The grounds of dissent in the Insular cases show that all of the Justices were agreed that the "general prohibitions," in support of "natural rights" limited the power of Congress to legislate for the Possessions.

Among these effective limitations is certainly that of the Fifth Amendment:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law."

In Fletcher *v.* Peck, 6 Cranch 87, the State of Georgia had authorized by statute the sale of state lands. After conveyance had been made by virtue of this statute the State Legislature by another statute undertook to annul and rescind the first law and to

avoid the title acquired by its authority. The case involved the prohibition of Art. 1, sec. 10, whereby the States are forbidden to impair the obligation of contracts. But the opinion of Chief Justice Marshall is of especial interest for our present inquiry.

> "Is the power of the legislature competent to the annihilation of such title, and to a resumption of the property thus held? (p. 135).
>
> "The principle asserted is, that one legislature is competent to repeal any act which a former legislature was competent to pass; and that one legislature cannot abridge the powers of a succeeding legislature.
>
> "The correctness of this principle, so far as respects general legislation, can never be controverted. But, if an act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power.
>
> "It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power and, if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation?
>
> "To the legislature all legislative power is granted; but the question, whether the act of transferring the property of an individual to the public, be in the nature of the legislative power, is well worthy of serious reflection.
>
> * * * * * * *
>
> "The validity of this rescinding act, then, might well be doubted were Georgia a single sovereign power. . . . (p. 136).
>
> * * * * * * *
>
> "The state legislature can pass no *ex post*

> *facto* law. An *ex post facto* law is one which renders an act punishable in a manner in which it was not punishable when committed. Such a law may inflict penalties on the person, or may inflict pecuniary penalties which swell the public treasury. The legislature is then prohibited from passing a law by which a man's estate, or any part of it, shall be seized for a crime which was not declared, by some previous law, to render him liable to that punishment. Why, then, should violence be done to the natural meaning of words for the purpose of leaving to the legislature the power of seizing, for public use, the estate of an individual in the form of a law annulling the title by which he holds that estate? The Court can perceive no sufficient grounds for making this distinction. . . . " (p. 138).

In the same case Mr. Justice Johnson, concurring, denies the application of Art. I, sec. 10, and puts his assent squarely on the ground of general principles.

> "I do not hesitate to declare that a state does not possess the power of revoking its own grants. But I do it on a general principle, on the reason and nature of things; a principle which will impose laws even on the Diety" (p. 143).

Authorities might be multiplied, but there will hardly be dissent from the principle. The confiscation of private property by legislation, "without due process of law," is so abhorrent to the whole spirit of the Constitution that if, as the *Insular Cases* so strongly suggest, there are limitations which Congress may not disregard in legislating for the territories, the "due process clause" is one of them. Indeed, it

is so specified by Justice Brown in Downe *v.* Bidwell, *supra*,—"the right to . . . individual property . . . to due process of law."

ALLEGED RATIFICATION IS PROHIBTED BY FIFTH AMENDMENT, U. S. CONSTITUTION

The alleged ratification attempts to destroy plaintiff's judgment, which is property. That there is neither compensation nor due process of law is obvious. That the judgment is property, within the meaning of the Fifth Amendment, is supported by uncontroverted authority.

> "A vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference. Whether it springs from contract or from the principles of the common law, it is not competent for the legislature to take it away." Cooley, Contitutional Limitations, p. 443.
>
> Approved in Pritchard *v.* Morton, 106 U. S. 124; Baltimore, etc., *v.* Reed, 158 Ind. 26, 56 L. R. A. 468; 6 R. C. L. 316.
>
> "A judgment is such a vested right of property that the legislature cannot, by a retroactive law, either destroy or diminish its value in any respect." 6 R. C. L. 319; Merchants Bank *v.* Ballou, 98 Va. 112, 44 L. R. A. 306; Strafford *v.* Sharon, 61 Vt. 126, 4 L. R. A. 499.
>
> "It has been determined by this court and numerous other courts that no one can be deprived of a vested right of action without infringing on that provision of our Constitution and that of the United States respecting the deprivation of life, liberty and property without due process of law." *In re* Flukes, 157 Mo. 125, 51 L. R. A. 176.

See also Lamb *v.* Powder River Co., 132 Fed. 439.

In the case of Choate *v.* Trapp, 224 U. S. 665, it appears that Congress by the Curtis Act of 1898, amended in 1902, provided for the allotment of tribal lands of Indians and for exemption of the individual holdings from taxation. In 1908 an Act of Congress authorized taxation of the same lands. The State of Oklahoma attempted to impose taxes and the Indians resisted. The Supreme Court, by Mr. Justice Lamar, says (p. 673):

> "The patent issued in pursuance of those statutes gave the Indian as good a title to the exemption as it did to the land itself. Under the provisions of the 5th Amendment there was no more power to deprive him of the exemption than of any other right in the property."

A very recent case, involving the same facts is Wood *v.* Love County, decided April 26, 1920, U. S. Adv. Ops. 1919-20, p. 492. This case follows Choate *v.* Trapp, but is interesting to us in that the suit was brought by the Indian to recover a tax paid under protest, which the County sought to retain under the supposed authority of an Act of Congress rescinding an exemption. If Oklahoma were still a territory the analogies would be complete. The Court says:

> "As these claimants have not disposed of their allotments and twenty-one years have not elapsed since the date of the patents, it is certain that the lands were non-taxable. This was settled in Choate *v.* Trapp, *supra,* and the cases decided with it; and it was also settled in those cases that *the exemption was a vested*

> *property right arising out of a law of Congress* and protected by the Constitution of the United States." (Italics ours.)

Whether a final judgment is in the nature of a contract or not, there can be no question but that it is a right of property which the Legislature cannot take away. A person, in whose favor such a judgment is entered, has a property right and he cannot be divested of the same without due process of law or just compensation.

> "A judgment is such a vested right of property that the Legislature cannot, by retroactive law, either destroy or diminish its value in any respect." 6 R. C. L. 319. Also see authorities in footnote.

UNITED STATES v. HIENSZEN DINTINGUISHED

A group of cases arose from the imposition, on goods imported into the Philippine Islands from the United States, of duties prescribed by the military tariff of 1898. In Lincoln *v.* United States (and Warner Barnes & Co. *v.* United States), 197 U. S. 419, it was held that after the ratification of the Treaty of Paris the military tariff lapsed for lack of authority in the President to maintain it; also that the attempted ratification of the President's action in section 2 of the Act of July 1, 1902 (the Philippines Bill), was ineffective.

Congress thereupon enacted a ratification of the tariff duties collected during the period in question, using the same formula that appears in the ratification of June 5, 1920. A suit for recovery of the protested duties, pending in the Court of Claims at the time of the ratification, was then pressed; this Court

in United States *v.* Heinszen, 206 U. S. 370, held that the ratification had cured the invalidity of the collection of duties, and denied the claim.

The Heinszen Case upholds, *under the facts of that case*, the power of Congress to ratify the collection of taxes imposed by the President without prior authority; it further holds that such ratification may divest a right of action *not reduced to judgment*. But the reasoning of the Heinszen opinion compels the opposite conclusion as to the validity and effect of the ratification of 1920 as applied in this case.

1. The military tariff of 1898 was superseded by a Philippine tariff act approved by Congress in the Act of March 8, 1902. The ratification of the military tariff applied, by its terms, to "the tariff duties—imposed—prior to March 8, 1902." The duties involved in the Heinszen case were collected after the Treaty of Paris and before March 8, 1902. It was not suggested, and could not have been contended, that the ratification of the military tariff could have validated any collections made ostensibly under its authority after its repeal.

In the present case the judgment covers export duties collected under the pretended authority of sec. 1614 of Act 2657 and after August 29, 1916, when so much of said section as authorized export duties was repealed by sec. 11 of the Jones Law. If there were involved herein any export duties collected under sec. 1614 before the repeal these would be covered by the terms of the ratification of 1920, which certainly can apply to the provisions ratified only so long as they remained in existence. (See, *infra*, the analysis of the terms of the ratification.)

The distinction is made by Justice White in the Heinszen Case (p. 285):

> "The proposition begs the question for decision, by shutting out from view the potential fact that when the goods were brought into the Philippine Islands there was a tariff in existence under which duties were exacted in the name of the United States."

In this case it may be said that when the goods were exported from the Philippine Islands the provision for export duties of sec. 1614 of Act 2657 was *not in existence*, having been repealed by sec. 11 of the Jones Law.

2. While the Heinszen case holds that a Congressional ratification may destroy a mere right of action, practically overruling in this respect De Lima *v.* Bidwell, 182 U. S. 1, yet the reasoning, by distinction, compels the conclusion that a claim reduced to judgment is immune. In the following quotations from the Heinszen opinion the italics are ours.

> "Nor does the mere fact that, at the time the ratifying statute was enacted, this action *was pending* for the recovery of the sums paid, cause the statute to be repugnant to the Constitution. The *mere commencement* of the suit did not change the nature of the right. . . .
>
> "Considering how far the bringing of actions would operate to deprive government of the power to enact curative statutes, which, if the actions had not been brought, would have been unquestionably valid, Cooley, in his Constitutional Limitations, says (7th ed. p. 543):
>
> "'Nor is it important, in any of the cases to which we have referred, that the legislative act which cures the irregularity, defect, or

> want of original authority, was passed after suit brought, in which such irregularity or defect became matter of importance. The bringing of suit vests in a party no right to a particular decision (cases cited); and his case must be determined on the law as it stands, not when the suit was brought, but *when the judgment is rendered.* (Cases cited)'" (p. 378).

In this case judgment was rendered before the ratification, and the right of plaintiff thus became vested and beyond the reach of the curative statute. That an appeal was taken from the judgment is, of course, immaterial. Under Philippine procedure, appeal from the judgment of a court of first instance does not vacate the judgment, and may not even suspend its execution.

3. In the Heinszen case the suit was against the United States. Mr. Justice Harlan, concurring, says (p. 391):

> "Interpreted in the light of previous and pending litigation, this act should be construed as denying the authority of any court to take cognizance of a suit brought against the United States to recover any claim arising out of such collections. The act should, therefore, be construed as withdrawing the consent of the United States to be sued on account of claims of that character. In this view, it was error to render judgment against the United States, whatever might be the liability of the collector, if his exaction of the duties in question was without authority of law. Upon this ground alone, and without considering any of the questions discussed in the opinion of the court, I concur in the judgment of reversal."

In these cases the suits are against James J. Rafferty and they involve only the "liability of the collector." The distinction is clear between an Act of Congress denying the liability of the United States and an Act which pretends to relieve one individual from his judgment debt to another.

III
CONGRESS NEVER ATTEMPTED TO RATIFY TAXES AT ISSUE

The argument thus far presented proceeds on the theory that by the Act of June 5, 1920, Congress really intended to ratify the illegal collection of taxes here in dispute, namely, those between September 30, 1916, and October 1, 1917. The Administrative Code of 1916, approved February 24, 1916, effective July 1, 1916, contains Section 1614 which was the subject of the Congressional Act of June 5, 1920. It is now proposed to demonstrate conclusively that Congress never intended by this Act of June 5, 1920, to ratify any of the taxes here in dispute, namely, any of those collected between September 30, 1916, and October 1, 1917, but did intend to ratify those taxes collected under authority of the same section of the Administrative Code of 1916, between July 1, 1916, the date the Code became effective, and August 29, 1916, the date the Jones Law became effective. Section 1614 of the said Administrative Code of 1916 imposed a tax on export sales and consignments and to that extent imposed export duties. On August 29, 1916, Congress enacted the Jones Law, Section 11 thereof providing "that no export duties shall be levied or collected on exports from the Philippine Islands." Congress had paramount power in the premises and

therefore the Jones Law repealed so much of the Administrative Code of 1916 as imposed export duties, for as Chief Justice Marshall says, in McCulloch *v.* Maryland, 4 Wheat. 316, 425:

> "A law absolutely repugnant to another as entirely repeals that other as if express terms of repeal were used."

A TAX ON EXPORTS FROM THE PHILIPPINE ISLANDS IS A REGULATION OF COMMERCE, AND EXCLUSIVELY WITHIN THE JURISDICTION OF THE CONGRESS OF THE UNITED STATES, UNLESS CONGRESS SPECIFICALLY GRANTS AUTHORITY IN THE PREMISES TO THE PHILIPPINE LEGISLATURE.

In reply to petitioner's contention (p. 22, sec. 111c) that the Philippines could impose export taxes without specific authority from Congress, it is sufficient to say that the Philippine Government derives all of its power from Congress. The Philippine Government has no inherent power to legislate. The first real Philippine legislation conferring authority upon the Philippine Islands to legislate was the Act of Congress of July 1, 1902, and in that act no authority was granted the Philippine Islands to impose export taxes. That it was well understood by both the Philippine government and by Congress that no such power to levy export taxes was granted is made manifest when we look to the Act of Congress of July 1, 1916, which ratified and confirmed the Act of the Philippine Legislature of December 21, 1915, as amended by the Act of February 4, 1916.

It is to be noted that at no time did Congress ever

confer upon the Philippine legislature general capacity to levy such an export tax. On the contrary, the only general law Congress passed was a specific prohibition against the levying of such an export tax, which prohibition is Section 11 of the Jones Law of August 29, 1916. The various ratifications that have occurred, as set forth by petitioner, have been confined exclusively to validating a special tax that had been imposed for a specific period of time. In Crew-Levick against Pennsylvania (245 U. S. 292; 256 Pa. St. 508) this Court held that a tax imposed upon the business of selling goods in foreign commerce is an attempt to regulate foreign commerce and is also an imposition upon such exports, using the following language:

> "The bare question, then, is whether a state tax imposed upon the business of selling goods in foreign commerce, in so far as it is measured by the gross receipts from merchandise shipped to foreign countries, is in effect a regulation of foreign commerce *or an impost upon exports*, within the meaning of the pertinent clauses of the Federal Constitution. Although dual in form, the question may be treated as a single one, since it is obvious that, for the purpose of this case, an *impost upon exports* and a regulation of foreign commerce may be regarded as interchangeable terms. And there is no suggestion that the tax is limited to the necessities of inspection, or that the consent of Congress has been given. We are constrained to hold that the answer must be in the affirmative."

The doctrine announced in that decision is in conformity not only with the commerce clause of the Constitution of the United States (Par. 2, Sec. 10,

Art. 1, Const. of the U. S.) but with many other decisions of this court of the United States.

Patapsco Guano Co. *v.* North Carolina Board of Agriculture, 171, U. S. 345, 350;
Brown *v.* Maryland, 12 Wheat. 419;
Nathan *v.* Louisiana, 9 How. (U. S.), 75;
Cock *v.* Pennsylvania, 97 U. S. 566;
Pittsburgh, etc., Co. *v.* Louisiana, 156 U. S. 590;
Trade-Mark Cases, 100 U. S. 82;
Almy *v.* California, 12 How. 169;
McCulloch *v.* Maryland, 4 Wheat. 316.

The right to regulate interstate commerce is expressly reserved to the Congress of the United States by the Constitution. The Congress exercised the right reserved to it by Sec. 11 of the Jones Law.

More clearly to understand just what was done by the Act of Congress of June 5, 1920, consider historically the entire subject. The Philippine legislature by an Act of December 21, 1915, effective January 1, 1916, imposed the first tax on exports out of the Philippines. At that time there had been no congressional authority given the Philippine legislature to impose such an export tax. On February 4, 1916, the previous law was changed so as to impose the tax on consignments abroad as well as sales, and there was still no congressional authority for the imposition of the tax. The Philippine legislature by Act of February 24, 1916, known as the Administrative Code and which superseded prior legislation, effective July 1, 1916, imposed a tax on exports. On July 1, 1916, by a rider on an appropriation bill the

Congress of the United States passed an act ratifying the export tax imposed by the Philippine legislature by the two Acts referred to, one of December 21, 1915, and the other of February 4, 1916, both effective January 1, 1916. It is to be noted that this act of Congress of July 1, 1916, did not ratify the tax imposed by the Administrative Code, known as the Act of February 24, 1916, effective July 1, 1916. It simply ratified the tax that had been imposed by the two proceding Acts, which of themselves died when the Administrative Code that superseded them went into effect July 1, 1916, died the very day the ratifying Act of Congress was passed. On August 29, 1916, Congress passed the famous Jones Law in the nature of a constitution for the Philippine Islands and in which the powers of the Philippine legislature were clearly set forth. This law had engaged the attention of Congress for a period of three years. Its provisions were matured with the utmost care. It was the most deliberate expression Congress has ever given in respect to local government in the Philippine Islands. One of the provisions that was the subject of much discussion, and one that was overwhelmingly adopted by Congress was that of Section 11, the pertinent part of which is as follows:

> "No export duty shall be levied or collected on exports from the Philippine Islands."

The Philippine Act of December 21, 1915, and the Philippine Act of February 4, 1916—both effective January 1, 1916—died July 1, 1916, in that they were superseded when the Philippine Administrative Code of 1916, passed on February 24, 1916, went into effect.

Therefore, when the Act of Congress of July 1, 1916, ratified the taxes which these two Philippine Acts had illegally imposed, its authority extended only down to July 1, 1916, the very day it was enacted, which was the day the two Acts went out of existence.

The export tax provision of the Code of 1916, being section 1614, which had been passed by the Philippine legislature without due authority of Congress died the minute Congress passed the Jones Law, August 29, 1916. If any authority for such an export tax existed anywhere by reason of an Act of the Philippine legislature prior to August 29, 1916, on that day it ceased to exist.

On March 10, 1917, the Philippine legislature passed the Philippine Administrative Code of that year, which became effective October 1, 1917. This Act of 1917 pretended to impose an export tax, notwithstanding the specific prohibition contained in the Jones Law above set forth. The following year, on June 4, 1918, by a rider on an appropriation bill, Congress ratified the export tax imposed by this Act of 1917, but confined its ratification exclusively to this particular export tax imposed in 1917.

In the effort to ascertain the intent of Congress in these various ratifications, it will help to pause a moment and contemplate the facts that were before Congress on June 4, 1918, when it passed this Act. The Jones Law of August 29, 1916, specifically prohibited an export tax. Nevertheless, the Collector of Internal Revenue of the Philippines, petitioner herein, had been collecting such tax and in open defiance of the Act of Congress. After the enactment of the Jones Law he collected the export taxes that are here in dis-

pute. He had also been collecting export taxes alleged to be imposed by the Administrative Code Act of 1917.

With both sets of facts before it, Congress did not ratify any export tax petitioner collected after the Jones Law was passed and prior to the taking effect of the Administrative Code of 1917. That is, Congress ratified no export tax that had been illegally imposed prior to October 1, 1917. Congress did ratify the export tax petitioner had collected subsequent to October 1, 1917. Therefore, Congress, having before it both sets of export taxes, both illegally collected, refused to ratify the one and did ratify the other. We must infer the intent of Congress, therefore, to be that it declined to go back beyond the Administrative Code of 1917 and deliberately declined to ratify the export tax that had been collected by petitioner prior to the taking effect of said Code of 1917.

At the time Congress passed the Act of June 4, 1918, respondents had begun their suits to recover the taxes at issue here. It would be only reasonable that Congress should decline to interfere with the respondetns' rights, as they were then in process of litigation.

On June 5, 1920, two years later, Congress passed another ratifying act in the following language.

> "The taxes imposed by the Philippine legislature in section 1614 of the Act numbered 2657, enacted by that body on February 24, 1916, are legalized and ratified, and the collection of all such taxes made under or by authority of such Act of the Philippine legislature is legalized, ratified, and confirmed as fully to all intents and purposes as if the same

had by prior Act of Congress been specifically authorized and directed" (41 Stat. 1015, 1025).

The question now is, Over what period of tax collection did Congress by this act intend to ratify or attempt to ratify? *It is contended by respondents that it is beyond all question that Congress intended to ratify only those export taxes collected by petitioner between July* 1, 1916, *and August* 29, 1916. It is to be especially noted that at no other time did Congress ratify the export taxes collected during this period. By the terms of the Act of Congress of July 1, 1916, the export taxes are ratified that were authorized by the Philippine Act of December 21, 1915, effective January 1, 1916, and the modification of the same by the Philippine Act of February 4, 1916. Congress did not then ratify any of the export taxes imposed by the Administrative Code of 1916 passed February 24, 1916, effective July 1, 1916. It appears clear that Congress, looking back, noted it had not ratified the export taxes during that period which had existed prior to the passage of the Jones Law, therefore by this Act of June 5, 1920, did ratify them.

Every consideration supports this contention. In no other way can these various Acts of Congress be construed in harmony with each other. Congress cannot always be presumed to do the wisest thing in the world, but it certainly can never be presumed to do a foolish thing. On June 4, 1918, Congress ratified such of the export taxes as had been collected after the passage of the Jones Law as it desired to ratify. It would be ridiculous for Congress, two years later, to take up the job again and ratify export taxes that had

been collected four years before and two years before the passage of the preceding act. Many months prior respondents had secured the final judgments in the highest court of the Philippines. Surely it could hardly be assumed that Congress would deliberately intend to confiscate respondents' property and nullify these judgments. It would neither be good morals nor good government. It would be about the worst sort of government anybody could conceive of. Furthermore a ratifying act of this character must be construed strictly. Its very language limits its application to the period between July 1, 1016, and August 29, 1916. It says:

> "Taxes imposed by the Philippine legislature in Section 1614 of the Act numbered 2657 . . . are . . . legalized, ratified, and confirmed as fully to all intents and purposes as if the same had by prior Act of Congress been specifically authorized and directed."

It does not presume to give that act of the Philippine legislature any more authority than the Philippine legislature had given it—in fact, exactly the same. The Philippine legislature had not been able to give by that act any authority beyond the passage of the Jones Law of August 29, 1916. When the Administrative Code of February 24, 1916, the one in question, was passed, no authority of Congress existed for the imposition of such export tax by the Philippine legislature. It became effective July 1, 1916. This Act of Congress of June 5, 1920, thereby gave this Philippine Act life and vitality it might have had when enacted, provided Congress theretofore had authorized the imposition of such an export tax. Sup-

posing Congress had theretofore empowered the Philippine legislature to impose such an export tax and thereafter the legislature had passed the Act it did pass February 24, 1916, the one in question, then the export tax would have died August 29, 1916, when the Jones Law became effective. This subsequent ratification of Congress must be construed only in the nature of legalizing that which the Philippine legislature had undertaken to do illegally, but nothing more. As the pertinent section of the Philippine Code of 1916 died August 29, 1916, so this ratification of June 5, 1920, can be presumed only to affect that period down to the said August 29, 1916. There is nothing in this ratification of June 5, 1920, that can even by implication be construed as a repeal of the great fundamental Jones Law. It is one thing to ratify some tax imposed illegally by a law of the Philippine legislature and quite another thing to repeal the Jones Law which had become the fundamental law of the Philippine Islands. It certainly is a violent assumption to say that by a rider on an appropriation bill, and one that was passed in the very last moments of a congested legislative session, Congress intended to repeal the Jones Law, which is the fundamental law even in the nature of a constitution for the Philippine Islands.

Let us view the subject from a slightly different line of argument.

June 5, 1920, Congress ratified the taxes imposed in section 1614 of the Administrative Code of 1916 and the collections made by its authority. It is clear that, while the ratification may have remedied the lack of authority for the export duties, it did not

prolong their life. The curative act does not pretend to impose taxes itself, but merely to validate taxes imposed by section 1614, and its saving grace lapsed with the provisions to which it attached. The ratification of collections extends only to those "made under or by authority of" Act No. 2657, and no export duties collected after the appropriate provisions of the Act were repealed by the Jones Law were made under, or by authority of, such provisions.

Suppose that the Philippine Legislature on August 29, 1916, had amended Act No. 2657 by striking from section 1614 the provision for export duties. Manifestly the imposition and collection of such export duties thereafter would have been wholly arbitrary, unjustified by the law, and would not be cured by the ratification. Is the case any different because the repeal was effected by Congress?

It will hardly be contended that ratification is *more effective* than prior authorization. In United States *v.* Heinszen, 206 U. S. 370, at page 384, Mr. Justice White adopts the statement from Mattingly *v.* District, 97 U. S. 687, 690:

> "The ratification, if made, was equivalent to an original authority, according to the maxim, *Omnis retihabito retrotrahitur et mandato priori acquiparatur.*"

And, in the ratification of June 5, 1920, Congress fixes the effect to be given to its action "as fully to all intents and purposes as if the same had, by prior Act of Congress, been specifically authorized and directed."

Let us apply the test prescribed by Congress. Suppose that, instead of ratification, there had been spe-

cific prior authorization and direction from Congress to the Philippine Legislature to impose export duties. Then the export duties under section 1614 of Act No. 2657 were perfectly valid from July 1, 1916, to August 29, 1916, after which date they were perfectly invalid because section 11 of the Jones Law not only withdrew the supposed prior authority, but positively forbade that form of taxation.

That the repeal preceded the ratification is immaterial. The two acts are not mutually repugnant; both can stand together; and, of course, if more than one construction is possible, that must be preferred that will enable them to stand together. The situation is no different from that which would have arisen if ratification and repeal had been effected by two sections of the same Act. Suppose that the Jones Law had provided in one paragraph for the ratification of section 1614 of Act No. 2657, and in another that no export duties should be levied or collected. The result would have been to validate the export duties to August 29, 1916, and to prohibit them from that date.

The ratification of June 5, 1920, does not repeal the prohibition of section 11 of the Jones Law, and, *a fortiori*, does not annul that prohibition restrospectively. If Act No. 2657 were of later date than the Jones Law, and section 1614 required curative action only in respect to export duties, there might be a contrary inference, because in such a case the ratification could have no application except in derogation of the prohibition and would repeal the latter to the extent of their repugnance, in accordance with the principle declared by Chief Justice Marshall in Mc-

Culloch *v.* Maryland (quoted *supra*). But the ratification has room for application to export duties under sec. 1614 before the date of the Jones Law; it has room for application, too, in respect to the taxes on sales of imports in original packages (import duties) which are not expressly forbidden by Congress, but were beyond the powers of the legislature. So the ratification and the prohibition not only are not repugnant, but they fit into each other perfectly.

> "Repeals by implication are not favored. This means that it is the duty of the Court to so construe the acts, if possible, that both shall be operative." Lewis' Sutherland, Statutory Construction, sec. 247.
>
> "The intention to repeal . . . will not be presumed, nor the effect of repeal admitted, unless the inconsistency is unavoidable, and only to the extent of the repugnance." *Id., id.*
>
> See, also, 25 R. C. L. 916, secs. 169, 170.

The judgment herein covers only collections made after October 1, 1916, and, therefore, after the repeal by the Jones Law of the export duty provisions of Act No. 2657. The ratification has no application herein.

IV

RULES OF CONSTRUCTION

We have already adverted to the principle that sec. 11 of the Jones Law and the ratification of June 5, 1920, must, if possible, be reconciled. The only way to avoid such reconciliation is so to interpret the ratification as to repeal *pro tanto*, and retrospectively, the Jones Law prohibition.

> "It is a well settled rule that laws are not to

be construed retrospectively, or to have a retrospective effect, unless it shall clearly appear that it was so intended by the enacting body, and unless such construction is absolutely necessary to give meaning to the language used." Lewis' Sutherland, op. cit., sec. 641.

Although in the Heinszen Case, *supra*, this Court holds that Congress has *power* to divest by ratification rights of action not reduced to judgment, the Court emphasizes the principle that doubts must be resolved in favor of such a construction as would save pending actions, and approves statements to the same effect in the De Lima Case and the Lincoln Case. Thus, citing the Lincoln Case, it is said (206 U. S. at p. 390):

> "In the course of the opinion, in answering the argument that the alleged ratifying statute would be meaningless unless it were held applicable to the particular duties in controversy, it was pointed out (202 U. S. p. 499) that there were duties levied and collected other than those in controversy, to which the act clearly applied, and 'that question (as to them) was put at rest by this ratification.' Further in calling attention to the ambiguity in the ratifying statute relied upon and the resulting doubt whether it embraced all duties, it was pointed out that the fact that actions were pending at the time of the ratifying act lent cogency to the view that, if Congress had intended by the ratification to affect them, it would have explicitly so declared. On this subject the Court said (p. 498):
>
> " 'This construction is favored by the consideration that the suits had been begun when

the Act of July 1, 1902, was passed, and that, even if Congress could deprive plaintiffs of their vested rights in process of being asserted (Hamilton *v.* Dillin, 2 Wall, 73), still it is not to be presumed to do so on language which, literally taken had a narrower sense.'"

If, as is said, there is a presumption against the intention of Congress to divest mere rights of action in process of being asserted, the presumption is stronger that Congress does not purpose to avoid such rights when reduced to judgment.

There is another potent principle that works against such a construction as would destroy vested rights. This is the presumption that statutes are not intended to work injustice. 25 R. C. L. 1022. To impose in 1920 a percentage tax on gross proceeds of exports of 1916 —and such would be the practical effect of the appellant's theory of the ratification—would be a hardship without precedent. For Congress to declare in 1916 that no export duties shall be imposed, to leave that declaration in full force until June, 1918, and then in 1920 to ratify collections made in 1916-17 in open defiance of its own prohibition, would be grossly unjust. Exporters were entitled to rely upon section 11 of the Jones Law so long as it stood unrepealed, to adjust their business accordingly, and to consider the sums paid under protest to lawless collectors as assets surely realizable by aid of the independent courts of a democracy. For Congress in 1920, after the protesting exporters had acted upon the assurance of Congress, and had borne the burden of litigation to enforce their plain rights, to revoke the assurance would be nothing less than bad faith.

"A state statute or an act of Congress will,

if possible, be construed so as not to convict the state or the United States of a breach of good faith." (Cases cited.) 25 R. C. L. 1029.

V.

TAXES INVOLVED ARE CLEARLY EXPORT TAXES

On Page 15, Section III-A, petitioner presents a rather novel argument stating that the export taxes in question are not exports, assuming that commodities shipped out of the Philippine Islands are to be termed "exports" only in case they are sent to countries other than the United States. Goods shipped out of the Philippines into the United States have always been considered exports by the Governments of the Philippines and the United States. The tariff laws of the United States for twenty years have so described commodities shipped from the Philippines into the United States. The decisions of the court in both jurisdictions are uniform in this regard. It certainly requires a stretch of the imagination beyond the capacity of the writer to picture commodities shipped from the Philippines into the United States as domestic sales.

VI.

CODIFICATION THEORY ABSURD

On Page 19, Section III-B, petitioner contends that the various acts of the Philippine legislature can and should be construed as codifications of the one law, not as separate, distinct acts. Several things make it absolutely impossible so to consider these acts. The first and most important obstacle is that the two vital acts, namely, that of the Philippine legislature, ap-

proved December 21, 1915, effective January 1 ,1916, as modified by Act of February 4, 1916, effective January 1, 1916, and the Act approved February 24, 1916, effective July 1, 1916, known as the Administrative Code of 1916, were both destroyed completely as to this tax provision by the Act of Congress familiarly called the Jones Law, of August 29, 1916. If Congress had the power to forbid such export taxes, any law theretofore passed by the Philippine legislature, imposing such a tax was immediately rendered null and void. The Philippine Act of 1917, subsequently passed, can hardly be said to have codified statutes which were dead and buried. Another obstacle that cannot be overcome is that the successive acts of the Philippine legislature referred to by petitioners differ one from the other in so many particulars and often essential particulars that they cannot be construed as successive codification of existing law. Reference to the acts as set forth in petitioner's brief immediately discloses the differences alluded to. The export tax was first only on domestic sales; later it was extended to sales abroad; then it was extended to consignments abroad.

These successive Acts of the Philippine legislature, having made these marked changes, cannot be said to be codifications of one existing law. They continually changed the law.

VII

INTEREST AND COSTS WERE PROPERLY ALLOWED

The Supreme Court of the Philippine Islands allowed interest to respondents at the legal rate of 6 per cent, covering certain periods specified in the

Court's opinion. This allowance of interest was in harmony with the Philippine code in effect which provides that interest shall be payable from date of demand. The question of allowing interest in a case of this kind has very recently been exhaustively considered by that Court and a final decision reached. The case was that of Hong Kong & Shanghai Banking Corporation *v.* Rafferty, 15 Off. Gaz. 1970.

In the above case the defendant Rafferty was sued to recover taxes by him illegally collected. The question of interest was the main question and was decided against him. Another case involving the same question and very recently decided by the same Court is that of H. E. Heacock Co. *v.* Insular Collector of Customs, 37 Phil. 97.

In conclusion, attention is especially directed to the fact that petitioner herein is an individual; that interest was allowed by the Philippine Court, not against the government, but against an individual.

Respecting the item of costs allowed respondents Smith, Bell & Co., it would seem that this Court never interferes with local rules or laws governing costs. In the Philippine Islands Act 190, known as the Code of Civil Procedure, in Section 487, it provides that costs shall ordinarily be allowed to the prevailing party as a matter of course, but leaves to the sound discretion of the court to rule otherwise in special instances. Inspection of the decisions of the Philippine Court in the Smith, Bell & Co. case, indicated that the item of costs received very earnest consideration. One of the Justices dissented on the sole ground of the award of costs.

In conclusion, we would again invite the Court's attention to the fact that petitioner herein is an individual and not a government, and quote the following from the opinion of the Philippine Supreme Court ordering judgment for respondents Smith, Bell & Co.

> "With reference to the costs, Sec. 487 of Act 190, provides that: 'Costs shall ordinarily be allowed to the prevailing party as a matter of course, but the court shall have power, for special reasons, to adjudge that either party shall pay the costs of an action, or that the same be divided as may be equitable.' We have, as a matter of practice, always imposed costs upon the appellant who has failed in this Court to obtain a reversal or a modification of the judgment of the lower court. There seems to be no good reason in the present case for changing or modifying that rule."

VIII

SUMMARY

Petitioner's only hope is in the Act of Congress of June 5, 1920, which was enacted three months after respondents had secured final judgments in the court of last resort in the Philippine Islands.

If by the said Act of June 5, 1920, Congress intended to validate these taxes, this act was void because unconstitutional.

The intent of Congress expressed in the Act of June 5, 1920, was not to commit an unconstitutional act, not to act oppressively and against every principle of morality and decent government, but to validate taxes otherwise illegal between the dates of July 1, 1916, and August 29, 1916, leaving

untouched the illegal taxes petitioner had collected from respondents during the period from September 30, 1916, to October 1, 1917, and to recover which respondents had secured final judgments in the Supreme Court of the Philippines.

Petitioner does not allege any errors of law committed by the court below; consequently these applications for writs in this court should be forthwith denied.

It is respectfully submitted that the writs must be denied.

CLARENCE B. MILLER,
Attorney for Respondents.

Nos. [illegible]

Office Supreme Court, U.S.
FILED
APR 9 1921
JAMES D. MAHER
Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1920.

JAMES J. RAFFERTY, as Collector of Internal Revenue for the Philippine Islands, Plaintiff-in-Error,

vs.

SMITH, BELL & COMPANY, LIMITED.

JAMES J. RAFFERTY, as Collector of Internal Revenue for the Philippine Islands, Plaintiff-in-Error,

vs.

COMPANIA GENERAL DE TABACOS DE FILIPINAS.

JAMES J. RAFFERTY, as Collector of Internal Revenue for the Philippine Islands, Plaintiff-in-Error,

vs.

VISAYAN REFINING COMPANY.

CERTIORARI TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS

MOTION TO ADVANCE, AND CONSENT

WM. SIEGRIST, INC., PRINTER, 9-15 MURRAY ST., N. Y.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1920.

JAMES J. RAFFERTY, as Collector of Internal Revenue for the Philippine Islands, Plaintiff-in-Error, *vs.* SMITH, BELL & COMPANY, LIMITED.	544
JAMES J. RAFFERTY, as Collector of Internal Revenue for the Philippine Islands, Plaintiff-in-Error, *vs.* COMPANIA GENERAL DE TABACOS DE FILIPINAS.	548
JAMES J. RAFFERTY, as Collector of Internal Revenue for the Philippine Islands, Plaintiff-in-Error, *vs.* VISAYAN REFINING COMPANY.	553

CERTIORARI TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

MOTION BY PLAINTIFF-IN-ERROR TO ADVANCE.

Comes now the plaintiff-in-error by his attorney and moves the Court to advance the above entitled causes and set them for hearing on June 13, 1921.

The cases all depend alike upon the determination of the question whether taxes which were paid by the defendants-in-error respectively, under protest, to the plaintiff-in-error, on shipments made from the Philippine Islands during the year from October 1, 1916, to September 30, 1917, aggregating Pesos 325,943.78 ($162,971.89), pursuant to the terms of Section 1614 of Act No. 2657 of the Philippine legislature of February 24, 1916 (Philippine Administrative Code of 1916), then in force, should be refunded on the ground that the collection of those taxes was in violation of Section 11 of the Philippine Organic or Autonomy (Jones) Act of Congress of August 29, 1916 (39 Stat., 545-548) to the effect that "No export duties shall be levied or collected on exports from the Philippine Islands," an Act of Congress having been approved June 5, 1920 (41 Stat., 1015, 1025), which purports to legalize and ratify the Section above mentioned of the Act of the Philippine legislature, and the collection of taxes under it. The plaintiff-in-error claims that the taxes so collected should be retained as property of the Government of the Philippine Islands.

The Court of First Instance of Manilla rendered judgments in favor of the defendants-in-error respectively and against the plaintiff-in-error, for the amounts of the taxes so paid with interest, and in No. 554 with costs, against the plaintiff-in-error here, on March 15, 16 and 18, 1920. Upon petitions in his behalf this Court granted writs of Certiorari to the Supreme Court of the Philippine Islands. Returns to those writs have been filed in this Court on March 9, 1921.

The amount involved is considerable, as stated above and the Government of the Philippine Islands is hampered and embarrassed in the conduct of its finances by uncertainty as to whether it will have to refund the taxes referred to. It is important therefore to the Gov-

COPY BOUND CLOS

ernment of the Philippine Islands that the question involved be speedily determined, to the end that it be relieved of that uncertainty.

CHARLES MARVIN,
Attorney for Plaintiff-in-Error.

NEW YORK, March 24, 1921.

The undersigned is advised that other cases depending upon the same question and involving several million Pesoes are pending before the Supreme Court of the Philippine Islands, decision therein awaiting a decision here.

IN CENTER

CONSENT AND JOINDER IN MOTION BY DEFENDANTS-IN-ERROR.

The several defendants-in-error in the cases named above, by their attorney, consent to the granting of the foregoing Motion of the plaintiff-in-error to advance and to set the cases for hearing on the date there asked, and join in the motion.

CLARENCE B. MILLER,
Attorney for Defendants-in-Error.

WASHINGTON, D. C., March 28, 1921.

ADMISSION OF SERVICE.

Due service of the foregoing application by plaintiff-in-error and of due notice that it will be presented to this court on April 11, 1921, at the opening of court on that day or as soon thereafter as counsel may be heard, is hereby admitted.

CLARENCE B. MILLER,
Attorney for Defendants-in-Error.

WASHINGTON, D. C., March 28, 1921.